REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 119 of 2008

DIMENSIONS ARCHITECTS & INTERIOR DESIGNERS LIMITED……...PLAINTIFF

VERSUS

BLUE SHIELD INSURANCE CO. LIMITED…….……. DEFENDANT

R U L I N G

The application under consideration has been brought by the Plaintiff and is expressed to be brought under Order VI Rule 13 (1) (b) (c) and (d) of Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks two orders:

1. THAT the Defendant's Defence be struck out.

2. THAT judgment be entered for the Plaintiff against the Defendant as prayed for in the plaint.

The basis of the application is cited on the face of the application namely:

(a) The Defence is scandalous, frivolous and vexatious.

(b) The Defence is intended to delay the fair trial of the action and is otherwise an abuse of the process of the court.

The application is also grounded on the supporting affidavit sworn by LEE GITUTO KARURI dated 2nd July 2008. I have considered the contents of the affidavit together with annextures thereto.

The application is opposed. The Defendant has sworn an affidavit dated 17th July, 2008 sworn by the Managing Director one PATRICK KULOVA WANJALA. I have considered the contents of that affidavit.

The principles to be considered when dealing with an application to strike out pleadings are well settled. In the celebrated case of D.T. Dobie vs. Muchina 1982 KLR 1, at page 8 Madan, Miller & Porter JJA cited with approval observation by Sellers LJ in Wenlock vs. Maloney & Others [1965] 1 WLR 1238:

"*This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in*

the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

In the Court of Appeal case of RAMJI MEGJI GUDKA LTD. VS. ALFRED MICHIRA & 2 OTHERS [2005] eKLR TUNOI, O,KUBASU and WAKI JJA held: -

"*In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issued to warrant adjudication by the court."*

The same court quoted with approval from the case of PATEL VS. EA CARGO HANDLING SERVICES [1974] EA 75 at page 76 where Sir William Duffus, P. put it thus:

"***T****he main concern of the court is to do justice to the parties and a court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merit. In this respect defence on the merit does not mean, in my view, a defence that must succeed, it means as SHERIDAN, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudicatio****n."***

I have considered the filed defence. The defence is a mere denial. It denies the existence of any contract between the Plaintiff and the Defendant but at the same time avers that as a result of the professional services rendered by the Plaintiff to the Defendant the Defendant suffered loss.

While determining the issue whether any triable issue has been raised by a Defendant in the suit, the court is entitled to look at all other pleadings filed. I have looked at the replying affidavit. Under paragraph 3 of the replying affidavit sworn by Patrick Kulova Wanjala, the Managing Director of the Defendant Company, the Defendant tries to explain why the basis upon which the sum claimed by the Plaintiff in the suit was not as per the agreement of the parties. The Defendant also tries to explain why the Plaintiff is not entitled to the sum claimed for the reason that its services were terminated before the works were completed.

I have also considered the supporting affidavit and there appears to be evidence that as a matter of fact, the Plaintiff revised upwards, the cost of the entire works, which in turn effectively raised the sum that it could claim from the Defendant under the contract. On that basis, the Defendant seems to have a point when he argues that the basis upon which the sum claimed was calculated was not as per the Agreement of the parties.

Having considered the pleadings, I do find that there is a triable issue in the matter and that issue should be determined at the trial when the judge will have the opportunity to hear oral evidence, tested by cross-examination and to also scrutinize documents placed before it by the parties. At this stage, not being fully informed of the evidence that will be relied upon by the parties, all I can say is that there is a triable issue which needs to go to trial. Whether the Defendant will succeed with that issue or not is a matter for the trial court to decide.

Having come to that conclusion, I find no justifiable reason to strike out the Defendant's defence at this stage or to enter judgment in favour of the Plaintiff. The application is therefore dismissed with costs to the Defendant.

Dated at Nairobi this 14th day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Kamonde for the Applicant

Ms. Abaye holding brief for Mr. Orenge for the Respondent

LESIIT, J.

JUDGE